

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NOS. F010619 (6/12/00) & F204234 (3/12/02)**

<b>JOAN BOYD, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>ST. BERNARD'S MED. CTR, SELF-INSURED EMPLOYER</b>	<b>RESPONDENT #1</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT #2</b>
<b>DEATH &amp; PERMANENT TOTAL DISABILITY TRUST FUND</b>	<b>RESPONDENT #3</b>

**AMENDED OPINION FILED JUNE 6, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on March 3, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE KRISTOFER E. RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondent #1 represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-style claims to determine the claimant's entitlement to additional workers' compensation benefits.

On December 14, 2004, a pre-hearing conference was conducted in these claims, from which a Pre-hearing Order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions

relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Ms. Joan Boyd, the claimant, Ms. Zepha Mattiace, and Ms. Edie Nichols, coupled with medical reports and other documents comprise the record in this claim. The parties were provide an opportunity to submit post-hearing brief. The brief of Respondent #2, the Second Injury Fund, was received with a March 9, 2005, cover letter, on March 10, 2005. Respondent #1 was allowed to submit its brief within twenty-one days of receipt of the brief of Respondent #2, and the same was filed on March 31, 2005. Claimant was provided to an opportunity to submit a brief within five (5) days of receipt of the brief of Respondent #1. Briefs were not submitted by the claimant or Respondent #3.

### **DISCUSSION**

Joan Boyd, the claimant, with a date of birth of January 13, 1955, commenced her employment with respondent on June 5, 1989. Claimant is a registered nurse having completed a two (2) year course to obtain her RN license after obtaining her high school diploma.

Prior to beginning her employment history outside the home in 1989, claimant had been a stay-at-home housewife as she raised her two children. Claimant's only other outside of the home work experience was approximately twenty-eight years earlier when she worked at a Wal-Mart store for a week or two.

Regarding her prior medical history, the testimony of the claimant reflects that she has had migraine headaches since December 12, 1980, usually once a week. Claimant has been diagnosed with high blood pressure since 1980, and currently takes prescription medication, Calan SR, for same.

Claimant initially suffered an injury to her low back in the employment of Respondent #1 on July 13, 1992, and underwent diagnostic studies for problems in the L4-5 and L5-S1 level. Claimant treated with Dr. Kenneth Tonymon, a Jonesboro neurosurgeon, for the complaint and was allowed to return to work with no heavy lifting on October 22, 1992. Claimant maintains that the lifting restriction imposed by Dr. Tonymon relative to the 1992 injury was subsequently lifted, and she resumed her regular employment duties as a staff nurse working the floor.

In describing her job duties in her employment with Respondent #1, claimant testified that as a RN she supervised the floor, which included total patient care and all medications. With respect to the lifting physical demands of her job claimant testified:

Only if you've got a patient that's gone into code and short of staff. And those patients that need to be moved up in bed because they cannot breathe, then you do what you have to do to get the job done to take care of the patient. (JX #1, p. 30).

On October 9, 1996, claimant suffered another injury to her low back within the course and scope of her employment with Respondent #1. As a consequence of the afore, claimant underwent diagnostic studies, to include a lumbar CT scan on October 15, 1996. Claimant treated with Dr. Tonymon for her 1996 low back complaint/injury and was off work for a period of time pursuant to his directions.

On September 19, 1998, claimant suffered another injury to her lower back within the course and scope of her employment with Respondent #1. (JX. #2, p. 108). Claimant was placed on restricted duty relative to the September 1998, injury, and furnished appropriated job duties. On April 2, 1999, claimant underwent a thoracic MRI which disclosed a T6-7 left disc protrusion with left nerve root impingement. While claimant never underwent surgery at the T6-7 level she

testified that she has had pain in the thoracic area every since. Claimant's assignment to restricted duties did not impact or effect her rate of pay prior to 2002.

On June 12, 2000, claimant suffered another injury within the course and scope of her employment with Respondent #1, which resulted in surgery at the L5-S1 level under the care of Dr. Tonymon on January 25, 2001. At the time of the June 12, 2000, injury, claimant worked in St. Bernard's Home Health. In describing the mechanics of the June 12, 2000, injury, claimant's testimony reflects:

I went to visit a little lady that had had a stroke and there was not one basically, like a family member, or anyone else in the room. Her bed was close to the floor so what I had to try to do is, I had went down, like on my knees to reach over to get her to check her blood pressure, and check her vital signs and stuff and assess her, I felt something like pop in my back and my back started hurting really bad. (T. 11).

On January 25, 2001, Dr. Tonymon performed surgery in th form of a left L5-S1 hemilaminotomy discetomy. Claimant acknowledged that she continued to have symptoms of persistent leg spasms following the surgery. Further, claimant acknowledged restrictions of no bending, twisting or stooping being imposed physical activities by her treating physician following the surgery. Claimant asserts that she complied with restrictions imposed by her physicians, to included a June 27, 2001, 50-pound lifting restriction.

The testimony reflects that in August 2001, claimant was treated by Dr. Calin Savu, a pain management specialist, who performed some medial branceh blocks from the L4 to the S1 level. In November 2001, claimant underwent another MRI of her lumbar spine which disclosed abnormal disc signal and degenerative disc disease. Further, in November 2001, claimant underwent a CT scan of her cervical spine which disclosed a bulge at the C3-4 level.

Claimant denies that 50-pound lifting restriction was still in place on March 12, 2002.

Regarding the manner in which the 50- pound lifting restriction was removed, claimant maintains that she was told that as a RN she could not have restrictions. Reconciling the furnishing of restricted duty by Respondent #1 to the position of same regarding the June 27, 2001, 50-pound lifting restriction, claimant's testimony reflects:

Yes. That was up to that point. At that point these years later I was working on the oncology floor, and they told me I could not have any restrictions as an RN.

\* \* \*

No. This is where St. Bernards told me, okay, as an RN - - in other words, Zetha, you cannot have restrictions. If you want to work as a nurse, you cannot have restrictions. (JX. #1, p. 35).

Claimant's testimony reflects that after she returned to work she continued to have back pain, however was able to cope with it until her March 12, 2002, injury. Claimant added that in coping with her symptoms prior to March 2002, she may have called in sick when she was unable to work due to her back. Claimant's testimony reflects that she addressed her residual back pain with over the counter medication [Excedrin, Tylenol, Ibuprofen, and aspirins] as she continued to work prior to March 12, 2002. (T. 22). The evidence reflects that physical restrictions imposed on the claimant by her treating physician relative to the June 12, 2000, compensable injury had only been lifted for about two to three months before she suffered the March 12, 2002, compensable injury in the employment of respondent #1.

On January 24, 2002, Dr. Tonymon assessed the claimant with a 10% permanent physical relative to the June 12, 2000, compensable injury and surgery. Claimant testified that she was unaware of the rating by Dr. Tonymon and her entitlement to corresponding indemnity benefit

until after the March 12, 2002, injury, when she received a letter from Respondent #1. Benefits were then paid on a bi-weekly basis.

The compensability of the claimant's March 12, 2002, injury is not disputed. In describing the mechanics of the March 12, 2002, injury, claimant testified:

I was working on the oncology floor, I went down with a tech to help with a patient in bed, she is a tiny little woman. I moved her up in bed, I went back up to the nurses desk, usually I'm a person who always stands to mix my medications and stuff but I was in such pain that I actually sat down and mixed my piggy back, that is the medication bag, because I was hurting. I went ahead and stayed the full shift and then when I got off of work, it was probably about one o'clock in the morning, because I work the three to eleven shift. By the time I got to my little caravan I could barely move. I knew I was going to be in big trouble, because I could hardly put my foot on the gas peddle to get home. And then when I did get home I had about three steps to get up, and the pain got worse, it was so severe that I couldn't move, I was screaming in pain. I was hurting so bad I could hardly stand up. (T. 13).

After reporting the March 12, 2002, injury to appropriate supervisory personnel of respondent #1, claimant came under the care of respondent's designated medical providers before ultimately returning to the care and treatment of Dr. Tonymon. Claimant noted that while her left leg had bothered her since the June 12, 2000, injury and surgery, following the March 12, 2002, injury, she had problems with both legs in addition to the low back pain. Claimant added that the left leg pain and complaints became worse following the March 12, 2002, injury.

The parties have stipulated that the claimant reached the end of her healing period relative to the March 12, 2002, compensable injury on July 17, 2003. Claimant acknowledge receipt of a March 28, 2002, correspondence from Respondent #1, which set forth the medical restrictions on her employment activities as imposed by Dr. Michael Lack relative to the March 12, 2002, injury, as well as an offer of a job within the restrictions. While claimant concurred in the

restrictions [no lifting, pushing, or pulling greater than 5 pounds; sitting job only; stand and stretch back hourly; and work no more than 8 hours daily], she maintains that she was physically unable to perform any job. The testimony of the claimant reflects, with respect to the restrictions:

Dr. Lack sent me a letter saying that I could return to work. Doctor Lack said there was nothing wrong. And, I called and told him, I said, "I can't get out of bed, I can barely get to the bathroom, I am definitely unable to drive." Then St. Bernard's told me, they said, well my children . . .

Zepha Mattiace, the supervisor in the oncology floor.

She told me, well your children can drive me. And, I said, "No, I can't do that." And, she said, the children can drive you and we can put you in a wheel chair and bring you to the desk. And, I said, "I have trouble getting to the bathroom, I cannot come down there and try to work." And I was taking pain pills and flexeril, like every four hours to try to control the pain. And, it did not work. . . (T. 13-14).

The testimony of the claimant reflects that at the time the job was offered to her in the March 28, 2002, letter, she was under the impression that she would be earning her same hourly rate of \$20.12 for a forty-hour work week. Claimant noted that when she actually returned to the employment of Respondent #1 in March 2003, to a position offered to her, the hourly rate was \$7.90, and \$8.65 for second shift. Further, while the job duties were the same as the position offered in the March 28, 2002, letter, it was in a different department, the heart floor versus the oncology floor. Claimant acknowledged that she also received a November 21, 2002, letter, from respondent #1, offering a job within the restrictions imposed by her treating physician, however she did not report for work. Claimant asserts that it was not until March 2003, that she felt that she was physically capable of returning to work.

Claimant explained that she reported back for work with respondent #1 in March 2003, because at that point she was hopeful that she would be able to perform the light duty job that was being offered. Claimant acknowledged that it was after she had undergone a functional capacity evaluation in 2003, that she contacted respondent #1 and relayed her willingness to return to work in the job offered/identified by respondent #1. Claimant testified regarding the results of her efforts at the light duty job:

Well, cause I've always worked, and I enjoyed my work. So, I was trying to go back to it but, I could not handle the sitting at the desk, answering the phone and working the medical charts, because the medical chart, I mean, they are metal, they are kind of heavy and just the moving itself was hurting, I still couldn't handle the pain. (T. 16).

Claimant asserts that she was unable to continue performing even the light duty job due to residuals of her injury. Claimant estimated that she was only able to work at the light duty job for a week. A pay stub produced by the claimant reflects that she worked a total of 27 ½ hours in her efforts performing the light duty job. Claimant asserts that at the times she realized that she could no longer perform the assigned job, she informed supervisory personnel that she was in too much pain. Further, claimant maintains that she asked if there was any other position available.

The testimony of the claimant reflects she left the employment of respondent #1, she was without income, so in April 2003, she spoke with personnel at Arkansas Methodist Hospital about possible employment. Claimant testified that she explained to the supervisor at Arkansas Methodist Hospital that she had a back injury and was not able to work full time. Claimant testified that the job at Arkansas Methodist Hospital was only to do medications and to RN assessments; did not entail any lifting; and that while a RN it was on a PRN - as needed basis. Claimant earned \$24.00 per hour in the position. Regarding the frequency of the hours she

worked at Arkansas Methodist Hospital, claimant's testimony reflects:

I tried to work and it wound up that I worked like one or two day a month. I tried to go like one a [or] two days a week, but that was too much. So, I had to cut it down. And finally I, I couldn't work. So, I tried. (T. 19).

Claimant testified that by 2004, she worked maybe twelve hours, and was unable to continue working due to the pain. Claimant noted that while her shifts were eight hours, by the time she was four hours into the shift she was hurting such that she could barely complete the shift, and never tried to work more that eight hours.

Claimant acknowledged that her rate of pay as a RN was not contingent on whether she did light, medium, or heavy work. Claimant further explained that as a RN so long as she was on the floor she received the same pay, unless she was assigned to the desk as a secretary.

Claimant maintains that she has been unable to return to gainful employment since she abandoned her efforts at Arkansas Methodist Hospital in 2004 due to residuals of her compensable injury in the employment of respondent #1. Claimant has kept her RN license current because of her pride in having achieved it in the first place.

The testimony of the claimant reflects that she applied for Social Security Disability in May 2002, and that the same was approved in June 2004. Among the health concerns listed as a basis for the social security claim by the claimant were migraine headaches, degenerative disc disease, prolapse mitral valve, hypertension. Claimant receives \$880.00, per month in Social Security disability benefits, in addition to medicare benefits.

In describing her current symptoms attributable to her injury, claimant's testimony reflects:

My back hurts, the left leg is trying to spasm. Yesterday I was in bed all day with a heating pad. I took a pain pill, I mean, my back was killing me yesterday, it was bad. Today, it's a little bit better, I'm still stiff, but a little bit better. (T. 22).

The testimony of the claimant reflects that she also experiences difficulty with her right hand, for which she has been doing exercises at home using small weights to get her arm and hand stronger. Claimant attributes the right hand complaint to nursing in general noting that one usually use the right hand for syringes and other routine nursing tasks.

Claimant describes a typical day as one of limited physical activity, to include playing board games or watching a movie with her grandchildren. Claimant explained that she never knows how she will feel when wakes in the morning, and as a consequence, does not have a normal daily routine. Claimant's testimony reflects:

I can wash dishes if it's like less than ten minutes because then the upper back pain starts in. I don't vacuum or sweep, the grand kids usually hep me with that stuff, because that really hurts your back. Basically that is about it, I mean, I stay in the bed.

I a microwave, I don't cook. I do not cook family meals because of the pain. I can't tolerated standing in the kitchen and actually cooking a family, or what I would call like a Christmas dinner for my children, I can't handle it. (T. 23).

Due to residuals of her injury claimant estimated that she could sit or stand for fifteen to thirty minutes before having to move about or change position. During a "real" good day claimant testified that she can remain up four to five hours in the morning before having to lay down; however on other days she is using a heating pad and taking medicine. Claimant acknowledge that she can drive for up to an hour, however the same is usually done during the course of visiting her mother, and she spends the night so she can rest before return home.

The testimony of the claimant reflects that she is unable to work a full-time/eight hour shift due to residuals of her injury. Claimant noted that during her employment efforts at Arkansas Methodist Hospital they wanted her to work overtime and she was physically unable to do it. Claimant acknowledge that the vocational case manager, Ms. Edie Nichols, sent her some job descriptions in the mail, however they were listed as full time positions.

Claimant's testimony reflects that the jobs identified by Ms. Nichols were sent in a letter, and were only received recently, in the week preceding the hearing. Claimant's testimony reflects with respect to her interest in the jobs:

They interest me, I mean, I would love to be able to do some of them, but I know that I can't. Because, it's like full time positions and there's no way I can work full time. I can't even work a part time.  
(T. 26).

Claimant testified that she has not been offered either of the jobs identified in Ms. Nichols' correspondence. Claimant acknowledged that she had not applied for any of the jobs in the correspondence, nor has she applied for unemployment benefits or a job through the Employment Security Division.

The testimony of the claimant reflects that in April 2004, while at home her sugar bottomed out to the point that she experienced a seizure. Claimant explained that she was close to dying at the time of the episode and that her body was going into spasm. Claimant added that her daughter just happen to come by to check on her and found her in her condition. Claimant underwent diagnostic studies at St Bernards Regional Medical Center as a result of the episode, to include EEG and a CT examination of the brain.

Claimant asserts that since the seizure episode she has had difficulty with her memory.

Claimant's testimony reflects that she forgot about the keyboard/computer program identified by Ms. Nichols in one of her correspondences, and, as such, did not followup on same.

Ms. Zepha Mattiace, who has been Patient Care Manager at Respondent #1 since October 2000, testified that in March 2002, she held the position over 3 East, Med-Serg/Oncology Care, and had been so for approximately six months. Claimant worked on 3 East at the time Ms. Mattiace became Patient Care Manager. Ms. Mattiace testified that in March 2002, she received a note from Dr. Lack indicating restrictions on the claimant's work activities relative to the March 12, 2002, compensable injury. The testimony of Mattiace reflects that a position in 3 East was offered to the claimant, in a March 28, 2002, correspondence within the restrictions authored by Dr. Lack.

Ms. Mattiace maintains that she did not hear from the claimant regarding the position offered in the March 28, 2002, correspondence. Regarding the type of position being offered to the claimant in the March 28, 2002, correspondence, Ms. Mattiace testified:

What we do is try to look at the individual restrictions for the clients and we try to look to see what we can offer them when they return. So, when they return we sit down and go over each duty that they are allowed to do based on the restrictions. (T. 86).

Ms. Mattiace testified that the claimant would have been returned as an RN in some type of light duty capacity at her same rate of pay as prior to the March 12, 2002, injury. Ms. Mattiace testified that a second offer to return the claimant to work was provided by Respondent #1 in a November 21, 2002, correspondence to the claimant. Ms. Mattiace's testimony reflects, regarding the job offer contemplated in the November 21, 2002, correspondence:

Again, being able to return based on any restrictions that the physician had set forth. (T. 87).

Ms. Mattiace maintains that the claimant would have been an RN, that Respondent #1 would have complied with the restrictions, and that her rate of pay would have remained the same. Ms. Mattiace testified that she did not hear from the claimant regarding the November 21, 2002, job offer. When questioned as to whether the positions offered to the claimant in the March 28, 2002, and November 21, 2002, correspondences were permanent full time positions, Ms.

Mattiace responded:

We were offering to bring her back at her regular hours that she had left and bring her back at this light duty until the physician said anything else different. (T. 89).

The testimony of Ms. Mattiace reflects that even had the claimant reported in for work pursuant to either the March 28, 2002, or November 21, 2002, correspondences and relayed her inability to function due to residual pain from her March 12, 2002, injury, as reflected in her testimony for the Commission, Respondent #1 had a job position available for her. (T. 96).

While Ms. Mattiace testified that she was familiar with the secretary position that the claimant returned to in March 2003, in the employment of Respondent #1, it was not 3 East. The secretary position was in the cardiology department of Respondent #1. Ms. Mattiace testified that the position was something arranged through Human Resources of Respondent #1.

Ms. Edie Nichols, a vocational consultant with Systematic Corporation, testified regarding her job duties:

I do evaluations, for people that have workers' compensation injuries, or long term disabilities and we do evaluations and do labor market surveys and recommendations, including review of the medical files, or what we've got in order to determine what positions might be available. (T. 97).

Ms. Nichols has a masters degree in rehabilitation counseling, and is a Certified Rehab

counselor. Ms. Nichols testified that she has been a vocational rehabilitation expert for two (2) years. Ms. Nichols was asked to perform a vocational evaluation of the claimant, pursuant to the directions of Respondent #1. Ms. Nichols first met with the claimant on January 12, 2005. Ms. Nichols noted that the purpose of meeting with the claimant was to determine if she had any return to work goals, and to get a background and medical history for the evaluation. The duration of the January 12, 2005, meeting with the claimant was approximately two (2) hours, following which a January 26, 2005, report was authored by Ms. Nichols.

Following the evaluation report, Ms. Nichols' testimony reflects that she began a labor market search and sent the claimant a couple of letters with three (3) job leads each, for her to look at and make contact with the employers. Ms. Nichols testified that it was her opinion that the claimant could return to some type of work activities. One of the jobs identified by Ms. Nichols in which there was an opening was utilization review nurse with the Department of Human Services. Regarding the job duties/tasks of the utilization review nurse, Ms. Nichols testified:

Yes, they review records and it depends, if they are working for Medicaid, then they are going to determine whether the services or [are] valid and need to be done. But, it's really going over a lot of records. (T. 99-100).

Ms. Nichols' testimony reflects that the position did not entail lifting of patients or actual patient contact, and that in reviewing the records the claimant could sit or stand as needed.

Ms. Nichols testified that the claimant informed her that she loved nursing and that is what she wanted to do as far as going back to work. Ms. Nichols noted that the claimant added that she did not feel like she was physically able to return to nursing. Ms. Nichols did not have

any further physical contact with the claimant following the January 12, 2005, initial meeting, other than sending the two (2) letters with the job leads.

Ms. Nichols concedes that she does not know the salary of either of positions identified in her letters to the claimant. Additionally, Ms. Nichols acknowledged that the positions identified in her letters to the claimant were not job offers. Ms. Nichols testified that the type of jobs claimant should be looking for fall within the sedentary to light job classification. Ms. Nichols explained:

That means there are four classifications, you've got sedentary, such as the lightest job duty you can have. And, you don't lift anything over ten pounds for that category. For light it is twenty pounds and that's on a occasionally lifting that kind of weight. Then medium is fifty pounds and heavy, then there is also very heavy, the weight goes up. And, the time that you are sitting and standing also differs. (T. 110).

Ms. Nichols acknowledged that her services would probably not be further utilized following the hearing on the claimant's claim on the extent of disability.

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports, vocational rehabilitation reports, and other documentary evidence, along with the appropriate statutory provisions and case law, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 12, 2002, the relationship of employee-employer existed between the claimant and Respondent #1.
3. On March 12, 2002, the claimant earned wages sufficient to entitle her to weekly

compensation benefits of \$425.00/\$319.00, for total/permanent partial disability.

4. On March 12, 2002, the claimant sustained an injury to her low back arising out of and in the course of her employment.

5. The claimant was temporarily totally disabled for the period beginning March 13, 2002, and continuing through on or about March 1, 2003.

6. The claimant reached the end of her healing period on July 17, 2003, as a result of the March 12, 2002, compensable injury in the employment of Respondent #1, which resulted in a 7% permanent physical impairment to the whole body.

7. When the claimant's age, education, permanent restrictions and physical limitations, and work history are considered, the evidence preponderates that she has been rendered permanently and totally disabled from engaging in gainful employment, and is entitled to corresponding permanent total disability benefits effective April 2004.

8. Claimant suffered prior compensable injuries in the employment of Respondent #1, to include a June 12, 2000, injury to her low which resulted in a permanent physical impairment in the amount of 10% to the whole body, which when combined with the March 12, 2002, compensable injury has produced the claimant's current disability status.

9. Respondent #2 is liable for the payment of wage loss disability benefits to the claimant in excess of the 7% anatomical impairment, to include permanent total disability benefits.

10. Respondent #1 shall pay all reasonable hospital and medical expenses arising out of the injury of March 12, 2002.

11. Respondent #1 has controverted the claimant's entitlement to temporary total

disability benefits growing out of the March 12, 2002, compensable injury.

12. Respondent #2 has controverted the claimant entitlement to wage loss disability benefits, to include permanent total disability benefits, in excess of the claimant's 7% permanent physical impairment.

### **CONCLUSIONS**

Claimant was employed by Respondent #1 as a registered nurse from June 5, 1989, until March 2003, during which time she suffered several compensable injuries. On June 12, 2000, claimant suffered a compensable injury to her low back in her employment with Respondent #1, and underwent surgery for same on January 25, 2001, which resulted in 10% anatomical impairment. On March 12, 2002, claimant suffered a compensable injury to her low back in her employment with Respondent #1, which resulted in a 7% anatomical impairment.

Claimant did not engage in gainful employment following her March 12, 2002, compensable injury between March 13, 2002, and late February/early March 2003, during which time she maintains she was temporarily totally disabled and correspondingly entitled to temporary total disability benefits. Claimant last discharged employment duties for Respondent #1 in March 2003. Claimant last discharged employment duties in April 2004. Claimant asserts entitlement to temporary total disability benefits and permanent total disability benefits.

Respondent #1 denies that the claimant is entitled to either temporary total disability benefits or permanent disability benefits in excess of the 7% permanent physical impairment growing out of the March 12, 2002, compensable injury. Respondent #1 asserts, in the alternative, that if the claimant is found to be entitled to wage loss disability benefit, Respondent #2 is liable for the payment of same.

Respondent #2 denies that the claimant is entitled to permanent partial disability benefits in excess of her anatomical impairment. Further, Respondent #2 denies it has any liability in this claim, as set forth in the contentions of its pre-hearing questionnaire response. The contentions of Respondent #3 are as set forth in the responsive Pre-hearing Questionnaire of same.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

The parties have stipulated the occurrence of the June 12, 2000, compensable low injury of the claimant which resulted in a 10% permanent physical impairment to the whole body, the date of maximum medical improvement and the payment of appropriate medical and indemnity benefits by Respondent #1 relative to same. Further, the parties have stipulated that the claimant suffered another compensable low back injury in the employment of Respondent #1 on March 12, 2002, which resulted in a 7% permanent physical impairment to the whole body when claimant reached maximum medical improvement on July 17, 2003, as well as the payment of appropriated medical benefits by Respondent #1 relative to the injury. Finally, the parties stipulated that claimant continued to work to some degree until April 2004, and, as a consequence would not be entitled to permanent total disability benefits prior to that time.

#### TEMPORARY TOTAL DISABILITY BENEFITS

Temporary total disability is that period within the healing period in which a claimant suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). Entitlement to temporary total disability

benefits for an unscheduled injury is contingent upon a showing that the claimant is completely incapacitated from earning wages and remain within her healing period.

In the instant claim, the parties have stipulated that the claimant did not reach the end of her healing period, relative to the compensable March 12, 2002, injury, until July 17, 2003. Claimant presents credible testimony to reflect that she was not physically capable of discharging employment duties following her March 14, 2004, visit with Dr. Michael Lack, respondent's designated medical provider. Claimant noted that her symptoms were such that she even had difficulty going to the bathroom and that she was unable to drive or ambulate at the time she was released to limited/restricted duties by Dr. Lack. In his March 14, 2002, report, Dr. Lack imposed the restrictions on claimant's employment activities to performing "sitting job only", "not to lift, push or pull greater than 5 lbs.", and that she needed to stand and stretch her back at least hourly, in addition to limiting her to a 8-hour work day. (JX. #2, p. 298).

Claimant was seen by her family physician, Dr. Donald Guinn on March 25, 2002. After noting the history of the claimant's March 12, 2002, compensable injury, and medical treatment received relative to same, to included that prescribed by Dr. Lack, Dr. Guinn noted that claimant was unable to stand or drive due to residuals of the injury. Dr. Guinn issued a certificate directing the claimant to remain off work for 10-days, as a result of his examination/evaluation of March 25, 2002. (JX. #2, p. 312). Claimant continued to receive active medical treatment relative to her March 12, 2002, compensable injury subsequent to March 25, 2002.

Claimant was forwarded a March 28, 2002, correspondence from Respondent#1 advising of the availability of a job within the restrictions imposed by Dr. Lack. At the time of the March 28, 2002, offer, claimant had been taken completely off work by Dr. Guinn as of March 25, 2002.

Further, a specific job was not identified relative to the “offer”. Indeed, the testimony of Respondent’s representative, Ms. Zepha Mattiace, the Patient Care Manager on 3 East, reflects that in order to offer a specific job for the claimant a discussion with the claimant was needed to determine her limitations.

Ark. Code Ann. § 11-9-526 provided:

If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers’ Compensation Commission, the refusal is justifiable.

In instant claim, claimant was under active medical treatment relative to her March 12, 2002, compensable injury at the time of the March 28, 2002, offer of Respondent #1. Further, claimant remained within her healing period and had a doctor’s certificate taking her off work completely for ten (10) days as of March 25, 2002.

Respondent #1 forwarded another “offer” of work to the claimant in a November 21, 2002, correspondence noting that work could be provided within the restriction of Dr. Kenneth Tonymon. At the time of the November 21, 2002, correspondence, claimant was receiving medical treatment relative to the March 12, 2002, injury under the care of Dr. Calin A. Savue, a pain management specialist, and Dr. Guinn, in addition to Dr. Tonymon. In deed, in a December 10, 2002, report, Dr. Tonymon noted that the claimant had been taken off work by Dr. Guinn until February 25, 2003.

The credible testimony of the claimant reflects that after her release to work by Dr. Guinn following her functional capacity evaluation, she contacted Respondent #1 and reported to for work. Claimant was assigned a secretarial job on a different floor, and attempted to perform for

as long as she could physically, approximately three (3) week. At the time claimant reported for work with Respondent #1 in late February/early March 2003, she remained within her healing period relative to the March 12, 2002, compensable injury.

The evidence preponderates that at the time Respondent #1 submitted job offers to the claimant in March 2002, and November 2002, claimant was within her healing period, under active medical treatment, and had certificates directing her to remain off work by her treating physician relative to her March 12, 2002, compensable injury. Claimant's refusal of the job offers was justifiable. *Superior Industries v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000). The claimant has sustained her burden of proof by a preponderance of the evidence that she remained totally incapacitated from engaging in gainful employment and within her healing period from March 13, 2002, and continuing through on or about March 1, 2003, as a result of the March 12, 2002, compensable injury, and correspondingly entitled to temporary total disability benefits. Respondent #1 has controverted the afore benefits.

#### WAGE LOSS

The wage loss factor is defined as the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). Ark. Code Ann. §11-9-522 (b)(1) provides:

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Ark. Code Ann. § 11-9-519 (e), provides, in pertinent part:

(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wages in the same or other employment.

In the instant claim, claimant is fifty (50) years of age. Claimant commenced her employment with respondent on June 5, 1989, as a registered nurse. During the course of her employment with Respondent #1 claimant has suffered numerous work related injuries, two of which have resulted in assessment of permanent physical impairments, as well as surgery.

The evidence discloses that when claimant returned to employment of Respondent #1 in March 2003, following her March 12, 2002, compensable injury she was assigned to secretarial duties at the desk in the cardiology department. Claimant was within her healing period at the time she attempted to perform the desk job duties. The credible testimony of the claimant reflects that she was unable to physically continue performing her assigned job duties due to residuals of her compensable injury. Claimant was only able to perform the job for approximately three (3) weeks, before having to abandon same. Claimant had previously earned in excess of \$22.00 per hours as a floor nurse in her employment with Respondent #1, however earned slightly in excess of \$8.00, per hour in the clerk position.

After claimant was unable to perform the desk job, she obtained employment as a registered nurse at another area hospital, Arkansas Methodist Hospital, which paid an hourly rate comparable to her earnings as a floor RN for Respondent #1. The physical demands of the claimant's job as a RN at Arkansas Methodist Hospital were severely limited, with minimum lifting, bending, standing, and walking. Claimant was unable to work as a full RN due residuals of her compensable injury. The credible evidence in the record reflects that even with the

modification of her work schedule and duties claimant was unable to continue in the employment of Arkansas Methodist Hospital as a RN due to a progressive worsening of her symptoms. By the time claimant left the employment of Arkansas Methodist Hospital in April 2004, she was unable to work more than four (4) hours of a scheduled eight hour shift.

Claimant underwent surgery relative to her June 12, 2000, lower back injury in the employment of Respondent #1, on January 25, 2001, and incurred a 10% permanent physical impairment as a result of same. Following the March 12, 2002, compensable injury in the employment of Respondent #1, claimant was assessed with a permanent physical impairment in the amount of 7% to the whole body when she reached maximum medical improvement on July 17, 2003. The evidence preponderates that the claimant has been unable to successfully discharge full time duties as a registered nurse since her March 12, 2002, compensable injury.

The evidence discloses that claimant is physically limited in the amount of time that she is able to sit or stand before having to change positions due to residuals of her compensable injury. Claimant is further limited in the activities of lift, bending, walking, twisting, driving, and riding in a vehicle. Claimant continues to experience spasms in her legs, along with weakness and pain in her lower back, upper back, neck, and right upper extremity. Claimant continued to take medication for her residual symptoms and perform occupational therapy routine geared toward increasing the strength in her upper right upper extremity.

The Arkansas Court of Appeals noted in a recent ruling that they had previously rejected the argument advanced by Respondent #2 with respect to Ark. Code Ann. §11-9-505, that because a claimant did not request a program of rehabilitation or pursue one on his own, he was not entitled to an award of permanent disability benefits in excess of his permanent impairment

rating. *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998), “citing *Second Injury Fund v. Furman*, 60 Ark. App. 237, 961 S.W.2d 787 (1998)”.

The evidence in this record preponderates that when claimant relayed that she was physically unable to perform the desk job provide by Respondent #1, which entailed a substantial reduction in her hourly wage rate, and requested further accommodation, none was forthcoming. Accordingly, claimant was forced to either continue to attempt doing the job or leave the employment of Respondent #1. The credible evidence in the record preponderates that Respondent #1 did not provide unlimited restricted duty to registered nurses in its employment.

Claimant secured employment with another health care provider after she was unable to discharged the assigned job duty in the employment of Respondent #1. While the claimant’s hourly rate of pay was comparable to that in her employment as a floor RN with Respondent #1, her actual duties and number of hours were substantially modified with her new employer, Arkansas Methodist Hospital. Nevertheless, claimant was unable to continue in the employment the subsequent employer as her condition attributable to the compensable injury of March 12, 2002, progressively worsened. By the time claimant ceased her employment with Arkansas Methodist Hospital in April 2004, she was not “earning meaningful wages”.

The claimant has sustained her burden of proof by a preponderance of the evidence that when her age, education, permanent restrictions and limitation, medical condition, attitude in seeking employment, and other matters that reasonably affect her future earning capacity are considered, she has been rendered permanently and totally disabled and is entitled to corresponding indemnity benefits as of April 2004.

In order for the Second Injury Fund, Respondent #2, to have liability in a claim, three

hurdles must be overcome. First, the employee must have suffered a compensable injury at her present place of employment. The parties have stipulated to the compensability of the March 12, 2002, injury to the claimant's low back in the employment of Respondent #1. Second, prior to the current injury, the employee must have had a permanent partial disability or impairment. In the instant claim, the parties stipulated that claimant suffered a compensable injury in the employment of Respondent #1 on June 12, 2000, which resulted in a permanent physical impairment in the amount of 10% to the body as a whole. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

The evidence in the record reflects that claimant continued to discharge employment duties as a RN in her employment with Respondent #1 following the June 12, 2000, compensable injury, to include the period following her January 2001, surgery. Claimant experienced residuals of the June 12, 2000, compensable injury as she discharged her assigned job duties prior to March 12, 2002. Further, the evidence preponderates that following the March 12, 2002, compensable injury claimant has been unable to returned to full time duties as a RN or any other employment. The evidence in the record preponderates that the claimant's current disability status is the product of the her prior impairment combining with the recent March 12, 2002, compensable injury, which has rendered her permanently and totally disabled. Respondent #2 is liable for the payment of permanent total disability benefits to the claimant. Respondent #2 has controverted the claimant's entitlement to permanent disability benefits in excess of the anatomical impairment.

#### **AWARD**

Respondent #1 is herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$410.00, for the period commencing March 13, 2002, and continuing through March 1, 2003, as a result of the March 12, 2002, compensable injury suffered by the claimant. Said sums accrued shall be paid in lump without discount.

Respondent #2 is herein ordered and directed to pay to the claimant permanent total disability benefits at the weekly rate of \$410.00, commencing April 2004, and continuing until such time as it has satisfied its obligation pursuant to Ark. Code Ann. § 11-9-519. Said sums accrued shall be paid in lump without discount.

Respondent #1 is further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses growing out of the compensable injury of March 12, 2002.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

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**Andrew L. Blood, Administrative Law Judge**